DATE: April 21, 1994
CASE NOS. 87-ERA-23
87-ERA-24

IN THE MATTER OF

CHARLES HILL, ET AL.,

COMPLAINANTS,

v.

TENNESSEE VALLEY AUTHORITY

RESPONDENT.

IN THE MATTER OF

EDNA OTTNEY,

COMPLAINANT,

v.

TENNESSEE VALLEY AUTHORITY

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

This case was remanded by the Secretary to the Administrative Law Judge (ALJ) on May 24, 1989, for a hearing on the merits after the Secretary found that the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988), prohibits covered employers from discriminating against any employee, not only their own

employees. *Hill and Ottney v. TVA*, 87-ERA-23, 24, Sec'y. Dec. May 24, 1989, slip op. at 4. Complainants here were employees of a contractor of Respondent, the Quality Technology Company (QTC), investigating and reporting to Respondent concerns of

Respondent's employees about quality and safety issues at Respondent's nuclear power plants in 1985 and 1986. Complainants allege that Respondent terminated QTC's contract, causing the layoff of Complainants, in retaliation for Complainants' "gathering and disclosing concerns of TVA employees about the safety of TVA nuclear power plants." ALJ Recommended Decision and Order of July 24, 1991 in Case No. 87-ERA-24 (No. 24 R. D. and O.) at 1-2. [1] Complainants Charles Hill and others in Case No. 87-ERA-23 filed a complaint on October 16, 1986, and Complainant Edna Ottney filed a complaint in Case No. 87-ERA-24 on October 24, 1986.

The ALJ recommended that the complaints be dismissed as untimely and found that there were no grounds for tolling the 30 day time limit in the ERA. 42 U.S.C. § 5851(b)(1) (1988); [2] Recommended Decision and Order of July 24, 1991 in Case No. 87-ERA-23 (No. 23 R. D. and O.) at 15-22. Complainants argued before the ALJ, and continue to assert to me, that the statute of limitations should be tolled because Respondent fraudulently concealed the true reasons for its actions by means of a media campaign to mislead them, as well as members of Congress, the press and the public. Respondent's announced reasons for terminating the contract were that QTC was lazy, slow, wrote poor reports and cost too much, but Complainants argue Respondent "fraudulently withheld from QTC the gravamen of its claim against TVA -- that TVA discharged complainants in retaliation for their reporting safety violations." Complainants' Memorandum of Points and Authorities in Support, in Part, and in Opposition, in Part, to the Recommended Decision and Order of the Administrative Law Judge in Case No. 87-ERA-23 (Complainants' Memorandum) at 27. [3]

I begin, as in any timeliness case under the whistleblower provisions in 29 C.F.R. Part 24 (1993), with the leading case of *School Dist. of Allentown v. Marshall*, 657 F.2d 16 (3d Cir. 1981). The Third Circuit held in that case that the time limit in the Toxic Substances Control Act, 15 U.S.C. § 2622(b)(1988), is like a statute of limitations and is not jurisdictional. 657 F.2d at 19; *see also Doyle v. Alabama Power Co.*, Case No. 87-ERA-43, Sec'y. Dec. Sept. 29, 1989, slip op. at 2, *aff'd*, *Doyle v. Secretary, U.S. Dep't. of Labor*, 949 F.2d 1161 (11th Cir. 1991). However, as the court in *Allentown* pointed out, "the restrictions on equitable tolling . . . must be scrupulously observed" and that such tolling is appropriate in three principle sitations: where 1) the defendant has actively misled the plaintiff respecting the cause of action; 2) the plaintiff has in some

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extraordinary way been prevented from asserting his rights; or 3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. 657 F.2d at 19-20, *citing Smith v. American President Lines, Ltd.*, 571 F.2d 102 (2d Cir. 1978). In addition, the court warned that "[t]he tolling exception is not an openended invitation to the courts to disregard limitations periods simply because they bar what may be an otherwise meritorious cause." *Id.* at 20.

Complainants attack the ALJ's R. D. and O. as misapplying the law of equitable tolling through fraudulent concealment. Three elements must be proven to show fraudulent concealment: 1) wrongful concealment of its action by Respondent, 2) failure of Complainants to discover the operative facts that are the basis of the cause of action within the limitations period, and 3) Complainants' due diligence until discovery of the facts. *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975). The ALJ's decision on this point, as well as the authorities he cited and those relied on by Complainants have been carefully reviewed, [4] and I find he has properly interpreted and applied the law of equitable tolling through fraudulent concealment, and I adopt parts V, VI and VII of the No. 23 R. D. and O. I have several observations, and references to additional authorities, which bolster the ALJ's conclusion.

As a preliminary matter, courts have long recognized that statutes of limitation and other similar filing deadlines should be equitably modified only in exceptional circumstances. Even so, when allegations have been made under the Energy Reorganization Act that an employer has retaliated against workers for raising safety concerns, this general rule must not be applied in such a way that the underlying purposes of that law are frustrated. Thus, it is exceedingly important that an appropriate balance be struck between fidelity to the statutory directive that complaints be pursued and investigated in a timely manner on the one hand and fairness to whistleblowing complainants on the other.

If the Complainants in this case had been misled by TVA about the facts giving rise to a cause of action, or if Complainants had attempted to pursue their claims with due diligence, this balance may have tipped in their favor. Such facts, however, have not been established. Instead, as the administrative law judge concluded, not only did the Complainants have good reasons not to rely on TVA's statements, but they did not rely on them. Thus, the evidence shows that the Complainants simply were not misled into sitting on their rights by TVA's statements. In addition, the Complainants have not offered a compelling explanation for why they delayed so long in investigating TVA's allegedly unlawful practices. As a result,

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and as I explain in more detail below, the facts of this particular case lead me to conlude that the Complainants' failure to meet the ERA's then applicable 30-day filing period cannot be excused.

The core of Complainants' argument is that equitable tolling applies where the Respondent has concealed the motives for its actions, even though the essential elements of a claim are known to a Complainant. *See* Complainants' Memorandum at 20 and 27 ("TVA affirmatively concealed the true reasons for its refusal to renew QTC's contract" and "fraudulently withheld from QTC the gravamen of its [QTC's] claim against TVA -- that TVA discharged complainants in retaliation for their reporting safety violations.") Complainants urge me to reject the ALJ's conclusion that equitable tolling applies only where a Respondent has concealed its *actions* which give rise to a cause of

action, but not when it conceals its motives. *Id.* at 35.

The substantial weight of authorities supports the ALJ's interpretation of the doctrine of equitable tolling by fraudulent concealment and, as noted above, I adopt it. Indeed, Complainants' position would require a Respondent either to confess violation of the ERA or be subject to suit for an indefinite period until the Complainant obtains evidence of Respondent's illegal motive.

Complainants rely on dictum in *Gomez v. Great Lakes Steel Div., Nat'l Steel Corp.*, 803 F.2d 250 (6th Cir. 1986), that "[p]erhaps a case for fraudulent concealment could have been made had [defendant] actively misled [plaintiff] by fabricating reasons for this lack of promotion." 803 F.2d at 255. But, as explained below and in the ALJ's Recommended Decision and Order in Case No. 23 at 17-21, the Complainants never proved that they were misled by whatever reasons TVA gave for terminating QTC's contracts. Thus, even if I were constrained to apply the *Gomez dictum*, I would find it inapplicable to the facts of this case. In addition, the actual holding of that case, that concealment of motives but not actions does not toll the pertinent statute of limitations, supports the ALJ's conclusion. The Sixth Circuit said:

> [Defendant] never admitted to [plaintiff] its alleged motivation of discrimination in not promoting him. . . . [But] the essential element . . . [of] fraudulent concealment is concealment of the *existence* of the claim . . . [not] concealment of the evidence necessary to prove such a claim. . . . [Plaintiff]'s argument seeks a *per se* rule that once an allegedly discriminatory act occurs and the employer fails to admit to the employee that the act was founded in discrimination, fraudulent concealment has occurred. Adoption of such a rule would effectively read the

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> statute of limitations out of employment discrimination actions.

Id. at 255.

I also do not agree with Complainants' assertion that *Jensen v. Frank*, 912 F.2d 517 (1st Cir. 1990), supports their position on equitable tolling and was miscited by the ALJ. Complainants' ellipsis marks in their quotation from *Jensen v. Frank* omit important modifiers which significantly limit the scope of what is in any event no more than *dictum*. The actual comment of the First Circuit, with words omitted by Complainants underlined, was "citing a pretextual basis for discharge may *conceivably* constitute active misleading *in certain instances*." 912 F.2d at 521. But plaintiff in *Jensen* simply was not misled, the First Circuit held, having told an EEO counselor that he had been discriminated against on the basis of national origin. He later learned of another case where an employee of the same national origin had been treated more leniently than plaintiff for the same offense, and claimed the time for filing his complaint should not have begun to run until he obtained that knowledge. The court said

> this argument confus[es] notice with evidence and overlook[s] the very purpose of the administrative requirement that timely contact be made. Not knowing every detail of a suspected plot cannot excuse a discharged employee from sleeping on his rights. It can ordinarily be assumed that many facts will come to light after the date of the employee's termination, and indeed one purpose of a charge and a complaint is to initiate the process of uncovering them.

912 F.2d at 521-22 (citation omitted); *see also Pacheco v. Rice*, 966 F.2d 904, 907 (5th Cir. 1992) ("It is to be expected that some relevant facts will come to light after the date of an employee's termination--one purpose of filing an administrative complaint is to uncover them. . . . The requirement of diligent inquiry imposes an affirmative duty on the potential plaintiff to proceed with a reasonable investigation in response to an adverse event." (Citations omitted.))

The Fourth Circuit also has rejected the argument that "active concealment" of the reasons for an adverse employment action tolls the state of limitations:

> this contention amounts to little more than a claim that the company's proffered reasons for its adverse employment action were pretextual. . . . If equitable tolling applied every time an employer advanced a non-

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> discriminatory reason for its employment decisions, it would be "tantamount to asserting that an employer is equitably estopped whenever it does not disclose a violation of the statute." (Citation omitted.) If this were the case, the [time limit] would have little meaning.

Olson v. Mobil Oil Corp.,904 F.2d 198, 203 (4th Cir. 1990).

Similarly, in *Merrill v. Southern Methodist Univ.*, 806 F.2d 600 (5th Cir. 1986), the Fifth Circuit expressly rejected the theory that the time limit in Title VII of the Civil Rights Act of 1964 does not begin to run until "the date the victim [of discrimination] first perceives that a discriminatory motive caused the act, rather than the date of the actual act itself." *Id.* at 605. That court held that the time begins to run from the date plaintiff knew of the alleged discriminatory act, because "[i]t might be years before a person apprehends that unpleasant events in the past were caused by illegal discrimination. In the meantime, under [plaintiff's] theory, the employer would remain vulnerable to suits based on these old acts." *Id.*, *citing Delware State College v. Ricks*, 449 U.S. 250 (1980); *see also Chapman v. Homco, Inc.*, 886 F.2d 756, 758 (5th Cir. 1989), *cert. denied*, 494 U.S. 1067 (1990) (age discrimination complaint filed only two days late dismissed as untimely although plaintiff did not learn of replacement by younger worker until weeks after discharge); *Klausing v. Whirlpool Corp.*, 38 Fair Empl. Prac. Cas. (BNA) 667, 671

(S.D. Ohio 1985) ("[T]he failure to tell plaintiff that he was demoted because of his age is not the type of deception or fraud that operates to toll the limitations period.").

In contrast, where the employer has misled the employee about the nature of the action taken against the employee, time limits are tolled until the employee learns the true character of the adverse action. In *Donovan v. Hahner, Foreman & Harness, Inc.*, 736 F.2d 1421, 1427-28 (10th Cir. 1984), for example, the 30 day time limit under the Occupational Safety and Health Act for filing a retaliation complaint was tolled because the employer misled the employee into believing he had been laid off, not fired and because the employee made diligent efforts to discover his true employment status, but was misled about it by the employer.

Several courts have held that statutes of limitation begin to run when the plaintiff possesses facts sufficient to make out a *prima facie* case, not when the plaintiff obtains evidence that proves discriminatory motive. For example, in *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 68 (1992), the Fifth Circuit held that

> a showing of deception as to motive supports equitable

> estoppel only if it conceals the very fact of discrimination; equitable estoppel is not warranted where an employee is aware of all the facts constituting discriminatory treatment but lacks direct knowledge of the employer's subjective discriminatory purpose. . . ." [W]hen 'facts that would support a cause of action are or should be apparent,' the statute commences even if the employee is not aware of all the evidence that he will ultimately rely upon at trial."

905 F.2d at 1217. [5]

In the context of statutes comparable to the ERA, which provide for preliminary administrative investigations prior to filing suit or requesting a formal hearing, time limits begin to run when a complainant has "knowledge of facts that would support a *charge* of discrimination." *Vaught v. R.R. Donnelley & Sons Co.*, 745 F.2d 407, 411 (7th Cir. 1984) (citation omitted) (emphasis in original.) [6] This approach is logical and I follow it because the purpose of a charge "is only to initiate the . . . investigation, not to state facts sufficient to make out a prima facie case." *Id.* Here, Complainants even had facts sufficient to make out a *prima facie* case in April 1986, [7] and certainly had enough to file a complaint with the Wage and Hour Division. *See* 29 C.F.R. § 24.3(a) (1992).

In *Heideman v. PFL, Inc.*, 904 F.2d 1262 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 676 (1991), a sales manager who was fired in 1979 filed suit under the Age Discrimination in Employment Act in 1986 when he obtained a copy of an internal "'smoking gun' memorandum . . . describ[ing] a policy designed to rid the company of older managers." *Id.* at 1264. He also argued that the statute of limitations should be tolled because the employer "affirmatively concealed the reason for his discharge. . . [that] he was fired for being too old," but the court said

> [w]e have no doubt that this is so. No employer is likely to admit to the disadvantaged employee a flagrant violation of federal law against discrimination on the basis of age, race or gender. Whether or not an employer tells its employee the true reason for the adverse employment decision is not the standard. Nor is it especially relevant that, as the facts show, [defendant] has attempted to conceal its discriminatory actions.

Id. at 1266. [8]

Equitable tolling was not justified because Plaintiff's delayed filing of a complaint in *Heideman* was not caused by the employer's concealment or misrepresentation. As in this case, plaintiff "was on notice from the very beginning that something was amiss," but let the limitations period run. 904 F.2d at 1266. Plaintiff never believed the employer's explanation for his discharge, testifying that "it didn't make any sense,"

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Heideman v. PFL, Inc., 710 F. Supp 711, 719 (W.D. Mo. 1989), and "he was certain at the time he was not being told the true reason for his discharge." 904 F.2d at 1266. "[Defendant] did not prevent [plaintiff] from finding out the truth merely because it did not openly proclaim its master plan to fire older employees because of their age." *Id.* at 1267.

Complainants here also did not believe Respondent's public explanation for termination of the QTC contract because "the [termination] letter didn't make sense from a business perspective," T. (transcript of hearing) 600; *see also* T. 594; 711; 718; 1064; 1118; 1140 (characterization of QTC's work in newspapers was "flat wrong"). Complainants thought "the first effort [should be] to try to . . . determine what was behind the issuance of the letter." T. 600. Although Complainants concede they were quite knowledgeable about the ERA and its time limit, T. 597-98, they did not file a complaint until October 1986 because "there was no *evidence* . . . that we had been, in fact, discriminated against." T. 600 (emphasis added).

I agree with the ALJ that the newspaper and trade journal articles about the controversy over termination of the QTC contract should have aroused Complainants' suspicions that Respondent's articulated reasons were pretextual. Respondent's January 22, 1986 letter was characterized as "look[ing] . . . like a coverup," clip from Jan. 23, 1986 Knoxville-News Sentinel attached to Nov. 1, 1990 Stipulation; "[t]aking QTC out of the nuclear concerns business at Watts Bar, complained one agency engineer. . . 'is like Richard Nixon firing Archibald Cox,'" *id.*, Jan. 23, 1986 Chattanooga News-Free Press; "'I'm afraid that QTC was doing too good a job and (TVA officials) [sic] may have wanted to keep them from looking into things,' said Rep. Jim Cooper, D-Tenn.," *id.*, Jan. 24, 1986 Knoxville Journal; "'TVA management appears to be engaged in 'damage limitation,'' [Rep. John] Dingell said. 'It appears that the two organizations that were created to identify and resolve such problems NSRS [Nuclear Safety Review Staff] and QTC are being suppressed,'" *id.*, Feb. 2, 1986 Chattanooga Times. One of the articles reported that "Watts Bar employees immediately contacted their representatives in Washington [after

the QTC contract was canceled] . . . They charged that TVA doesn't want a contractor around which tells the agency news it doesn't want to hear. QTC has uncovered several confirmed cases of harassment by TVA managers . . . ." *Id.*, Jan. 26, 1986 Energy Daily. If Respondent's own employees suspected cancellation of the QTC contract was retaliatory, it is reasonable to expect Complainants should have as well. [9]

Complainants claim the ERA time limit did not begin to run until they saw an article in the Knoxville Journal of September 22, 1986, quoting William Wegner, an assistant to TVA's

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Manager of the Office of Nuclear Power, that "[w]e were going to have to do something about QTC. . . . It was a cancer to be dealt with." Complainants claim that they first believed termination of the QTC contract was discriminatory when they read this statement. Charles Hill, the lead Complainant in Case No. 23, testified, for example, that this statement led him to realize Respondent's explanations for its action were rationalizations, that is, pretextual. T. 602.

Mr. Wegner's statement may be evidence of discriminatory motive, but the fact that Complainants became aware of it months after termination of the QTC contract does not warrant equitable tolling. Only concealment of the fact that a cause of action exists, not concealment of evidence proving violation of the statute, justifies equitable tolling. *See Gomez v. Great Lakes Steel* at 255; *Christopher v. Mobil Oil Corp.*, at 1217.

Mr. Wegner testified he recollected that Chuck Mason, Deputy Manager of Nuclear Power of TVA, made the "cancer" statement during the November 1985 review conducted by Mr. Wegner and Admiral White, T. 3284-88. Mr. Wegner's report of the statement was first put in writing in a Wage-Hour Administration report of an interview with Mr. Wegner, conducted on May 30, 1986, in connection with another ERA complaint, C-498, but the Knoxville Journal did not report the "cancer" statement until September 22, 1986. Under Complainants' theory, if Mr. Wegner's statement had not been available to the Knoxville Journal, or the newspaper had run its two-part series on "The Saltwater Network" several months later, the time limit would not have begun to run until then, or until Complainants obtained evidence by some other means of Respondent's discriminatory motive. If no such evidence had come to light, under their theory they could still file a complaint within 30 days of whenever it did. This interpretation would virtually eliminate the time limit from the ERA, as the cases discussed above point out, and I cannot adopt it.

Accordingly, I adopt the ALJ's recommendation that the complaints in these cases be DISMISSED because they are time barred. [10]

SO ORDERED.

ROBERT B. REICH

Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1]
The ALJ submitted a detailed 38 page decision in Case No. 87-ERA-23, where a full record also was developed, and a four page decision in Case No. 87-ERA-24 which essentially incorporated and adopted the conclusion in No. 23 that the complaints were untimely. Unless otherwise noted these decisions will be refered to collectively as "the R.D. and O."

[2] The ERA was amended in 1992 to, among other things, lengthen the time for filing complaints to 180 days. Comprehensive National Energy Policy Act § 2902, Pub. L. No. 102-486, 106 Stat. 2776 (Oct. 24, 1992). The new time limit, however, only applies to claims filed on or after the date of enactment, October 24, 1992.

[3]
Complainants' Motion to Enlarge Page Limit for Complainants' Brief to the Secretary of Labor in Case No. 87-ERA-23, to submit a brief five pages in excess of the 35 page limit established in the briefing schedule in this case, is granted.

[4]
Although not crucial to their argument, I note that Complainants cited several ALJ recommended decisions in a manner which implies they were final decisions of the Secretary. *See* administrative decisions cited at pp. 15, 16, and 18 of Complainants' Memorandum. ALJ recommended decisions in ERA cases are simply that and have no precedential value unless explicitly adopted by the Secretary. The ALJ decisions cited by Complainant were not adopted by the Secretary.

[5]
The Secretary's decisions on tolling the time limits in whistleblower cases follow court decisions that the time begins to run "when the *facts* which would support the discrimination complaint were apparent or should have been apparent to a person with a reasonably prudent regard for his rights similarly situated to Complainant." *McGough v. United States Navy*, Case Nos. 86-ERA-18, 19, 20, Sec'y Dec. Jun. 30, 1988, slip op. at 9-10 (citing numerous cases) (emphasis added). *See also In the Matter of Charles Kent*, Case No. 84-WPC-2, Sec'y. Dec. Apr. 6, 1987, slip op. at 11 (equitable tolling warranted where Respondent "misrepresented or fraudulently concealed *facts* necessary to support [a]

complaint. (emphasis added.))

[6]
Complainants protest that had they filed a complaint based on the "limited" information available before May 1, 1986, their attorneys would have been subject to sanctions under Rule 11 of the Federal Rules of Civil Procedure. But as the court pointed out in *Cada v. Baxter Healthcare Corp.*, 920 F.ed 446, 452, "we are speaking not of a judicial complaint, but of an administrative complaint. There is no duty of precomplaint inquiry in EEOC proceedings, as distinct from federal court actions (Fed. R. Civ. P. 11)." *See also Cox v. Radiology Consulting Assoc., Inc.*, Case No. 86-ERA-17, Sec'y Dec. Nov. 6, 1986, slip op. at 8 ("The purpose of [a complaint] is to empower the Department of Labor to investigate a claim and gather evidence. The claim does not have to be fully developed and proven when filed.")

[7]
A *prima facie* case consists of a showing that the employee "engaged in protected conduct, that the employer was aware of that conduct and . . . took some adverse action against him. In addition . . . '[Complainant] must present evidence sufficient to raise the inference that . . . protected activity was the likely reason for the adverse action.' [citation omitted.]" *Dartey v. Zack Co. of Chicago*, 82-ERA-2, Sec'y. Dec. Apr. 25, 1983, slip op. at 7-8. Temporal proximity between the protected conduct and the adverse action raises an inference of discrimination. *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989).

[8]
The court reached this result even though defendant's conduct toward plaintiff and other older employees "appear[ed] [to the court of appeals] to have been egregious," and the "smoking gun memorandum" virtually constituted direct evidence of discrimination. 904 F.2d at 1264.

[9]
Complainants point out that various members of Congress who at first questioned Respondent's actions in terminating the QTC contract later softened their criticism, in response, Complainants' assert, to Respondent's campaign of deception. A legislator's reasons for pursuing or declining to pursue an inquiry may have many origins; all, however, are irrelevant here.

[10]
In view of my dismissal of these complaints as untimely, it is not necessary for me to reach the merits or address the other issues discussed in the ALJ's R. D. and O.